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IN THE
Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 983.

SAMUEL O. BLANC,
Petitioner,

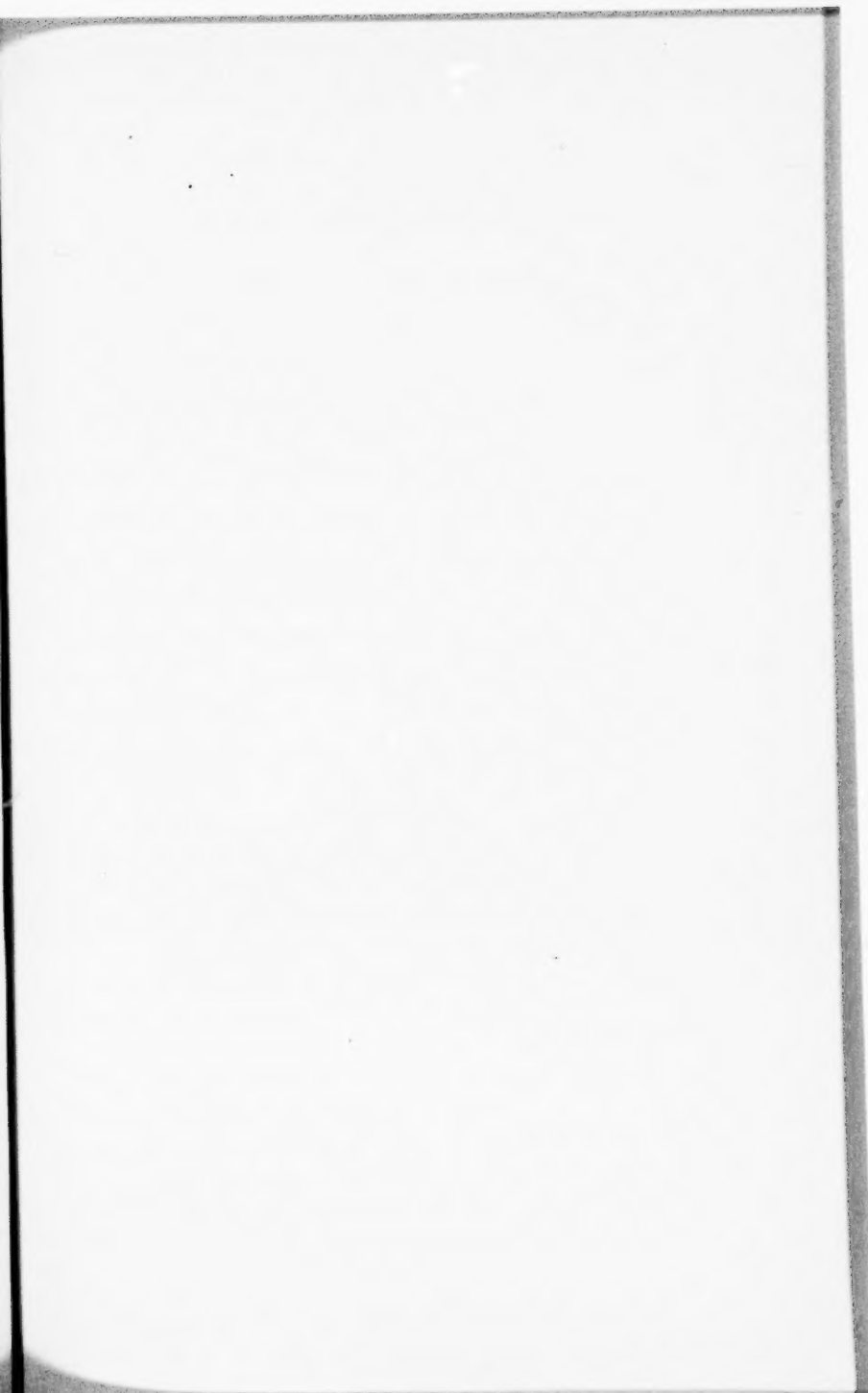
vs.

AL CAYO, doing business as
CAYO ELECTRIC MACHINE,
Respondent.

**PETITION FOR WRIT OF CERTIORARI AND
BRIEF IN SUPPORT THEREOF.**

GORDON F. HOOK,
38 S. Dearborn Street,
Chicago, Ill.,
Counsel for Petitioner.







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PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR WRIT OF CERTIORARI

*To the Honorable, the Chief Justice and Associated Justices
of the Supreme Court of the United States:*

Your petitioner, Samuel O. Blanc, prays that a writ of certiorari should issue to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered December 16, 1943, (R. 253), rehearing denied February 14, 1944 (R. 281).

A certified transcript of the record in the case, including the proceedings in said Circuit Court of Appeals, is furnished herewith, in compliance with Rule 38 of the rules of this Court.

Summary Statement of the Matter Involved.

This is a suit brought by petitioner against respondent for infringement of petitioner's Patent No. Re. 22,113, issued July 16, 1942, and based on original patent No. 2,111,527, dated March 15, 1938, and Patent No. 2,069,871, issued February 9, 1937. Patent No. 2,069,871 relates to a cutter designed particularly for cutting penetrating roots from the interior of sewer pipes by the operation of a sewer cleaning machine forming the subject matter of Reissue Patent No. 22,113 which automatically imparts to the cutter the power and motion required for cutting roots from the sewer to clean the same. For convenience, these patents will be referred to as the "Cutter Patent" and the "Machine Patent," respectively.

The District Court for the Western District of Michigan, Southern Division, held claims 4, 5, 7, 8, 9, 10 and 11 of the Machine Patent invalid for lack of invention, and not infringed, and claims 1 to 6 of the Cutter Patent not infringed (R. 29).

The Court of Appeals for the Sixth Circuit affirmed the decree of the District Court dismissing the complaint, on the predicate of non-infringement by respondent of any of the claims in suit, in either the Machine or Cutter Patents (R. 253).

This petition is directed to a review of the decision of the Court of Appeals as to the Machine and Cutter Patents.

Jurisdiction.

1. This is a suit arising under the Patent Laws of the United States, Judicial Code, Sec. 24 (7) (28 U. S. C., Sec. 41 (7)).

2. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C., Sec. 347).

3. The date of the judgment which petitioner seeks to have reviewed is December 16, 1943 (R. 253). The petition for rehearing was denied February 14, 1944 (R. 281).

Questions Presented.

The decision of the Circuit Court of Appeals for the Sixth Circuit presents the following questions:

1. Whether the conflict between the decision of the Circuit Court of Appeals for the Sixth Circuit in this cause and the decisions of the Circuit Court of Appeals for the Eighth Circuit and the District Courts therein, with respect to the scope and interpretation of the patents in suit, should be resolved in order that the public at large may be properly advised as to what devices and mechanisms constitute infringements of the patents in issue.

2. Whether the Circuit Court of Appeals for the Sixth Circuit properly held respondent's machine and cutters not to infringe the patents in suit, in view of the construction and interpretation given said patents by that Court in its prior decision in *Blanc v. Curtis*, 119 Fed. 2d, 395.

3. Whether the supervisory authority of this Court should be exercised in reviewing the decision in this cause in the interest of the public and the uniform application of federal justice, where, as in this case, the decision is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis*, 119 Fed. 2d 395, which established a precedent with respect to infringement of the claims of the patents then in issue and is in conformity with and has been followed in cases involving the same patents in the Eighth Circuit.

4. Whether the Court of Appeals' perfunctory approval of the District Court's decision in this cause or the prior decision of the Court of Appeals in the case of *Blanc v. Curtis*, 119 Fed. 2d 395, with respect to the scope and interpretation of the claims of the patents herein in issue, should prevail; a question of vital importance to the public and which should be determined by this Court, especially in view of the apparent intention of the Court of Appeals in this cause to follow its prior decision.

Reasons for Granting the Writ.

The discretionary power of this Court to grant a writ of certiorari is invoked upon the following grounds:

1. Conflict with prior decision of the Court of Appeals for the Sixth Circuit.

(a) The Court of Appeals for the Sixth Circuit has held the claims of petitioner's patents in suit not infringed by respondent's machine and cutters, whereas in the earlier case of *Blanc v. Curtis*, 119 Fed. 2nd 395, the Court in considering the claims of the original of the Reissue Machine Patent and the Cutter Patent evaluated petitioner's contributions in the art and in construing the claims then in issue ascribed to petitioner's inventions the very devices complained of in this cause.

2. Confusion and conflict exists between decisions of the Court of Appeals for the Sixth Circuit and prior decisions of the Circuit Court of Appeals for the Eighth Circuit and the District Courts within said Circuit.

(a) In deciding the case of *Blanc v. Curtis*, 119 Fed. 2nd 395, the Court emphasized that its decision with respect to the patents was in conformity with the decisions reached by the District Court in the cases of *Blanc v. Weston*, 33

U. S. P. Q. 466, *Blanc v. Weston*, 35 U. S. P. Q. 150 and *Blanc v. Weston, et al.*, 42 U. S. P. Q. 427, whereas the decision in the present cause is inconsistent and in clear conflict with said decisions in the Eighth Circuit.

(b) The burden of resolving the conflict existing between the decisions of the Court of Appeals for the Sixth Circuit in this cause and in *Blanc v. Curtis*, 119 Fed. 2d 395, with respect to infringement of the Cutter Patent places the public in an embarrassing position for the reason that either construction which said Court of Appeals has apparently placed on the claims of said patent is inconsistent with either the decision of the Court of Appeals for the Eighth Circuit in the case of *Blanc v. Weston*, 109 Fed. 2nd 911, or the decisions of the District Court in the cases of *Blanc v. Weston*, 33 U. S. P. Q. 466 (8th Circuit), *Blanc v. Weston*, 35 U. S. P. Q. 150 (8th Circuit), and *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54 (8th Circuit).

(c) The decision of the Court of Appeals for the Sixth Circuit in the present cause with respect to infringement conflicts with the decisions of the District Court for the Southern District of Iowa, Southern Division, in the cases of *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54, in which the prior case of *Blanc v. Curtis*, 119 Fed. 2nd 395, was recognized as establishing a precedent with respect to the subject matter involved, and in which the Court on the basis of such authority held machines and cutters conforming in substance to those of respondent's in this cause to be infringements of the Machine and Cutter Patents.

3. Public interest involved.

(a) Because of the utter confusion and lack of uniformity which has resulted because of the conflict of decisions with respect to infringement of the Machine and Cutter Patents, it is of great public interest that such conflict be

resolved and the scope and interpretation of the claims of said patents judicially determined to secure consistency and uniformity in the administration of federal justice with respect to these patents.

Wherefore, it is respectfully submitted that a writ of certiorari to the Circuit Court of Appeals for the Sixth Circuit should be granted.

GORDON F. HOOK,
Counsel for Petitioner.





BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The findings and conclusions of the United States District Court for the Western District of Michigan, Southern Division, were filed May 18, 1943, (R. 18) and the decree entered pursuant thereto on May 24, 1943 (R. 29). The findings and conclusions adopted by the Court are reported in 50 Fed. Supp. 552.

The opinion of the Circuit Court of Appeals for the Sixth Circuit was filed December 16, 1943 (R. 254). It is reported in 139 Fed. 2d 695. Petition for rehearing (R. 257) was denied February 14, 1944. (R. 281.)

Jurisdiction.

Note petition (*supra*, p. 2).

Statement of the Case.

The essential facts of the case are stated in the accompanying petition for writ of certiorari.

Specification of Errors.

The errors which petitioner will urge if a writ of certiorari is issued are that the Circuit Court of Appeals for the Sixth Circuit erred:

1. In holding that claims 4, 5, 7, 8, 9, 10 and 11 (of which claims 4, 8 and 10 are typical) of the Machine Patent were not infringed.
2. In holding that claims 1-6, inclusive, (of which claims 4 and 6 are typical) of the Cutter Patent were not infringed.
3. In failing to adhere to the guiding principles set down by the Court in its prior decision in *Blanc v. Curtis*, 119

Ed. 2nd 395, on which to determine infringement in this cause, and which failure so to do has resulted in confusion and lack of uniformity of decisions within the Sixth Circuit, with respect to the scope and interpretation of the Machine and Cutter Patents.

4. In failing to follow its prior decision in the case of *Blanc v. Curtis* with respect to the determination of infringement in this cause, thus leading to a conflict between the decision in this case and District Court decisions in the Eighth Circuit based on said case of *Blanc v. Curtis* as a precedent.

ARGUMENT.

Validity of Machine and Cutter Patents Sustained.

The validity of the original and Reissue Machine Patent, as well as the Cutter Patent, has been sustained by the Court of Appeals for the Sixth Circuit in this cause and in its prior decision of *Blanc v. Curtis*, 119 Fed. 2nd 395, the Court of Appeals for the Eighth Circuit, 109 Fed. 2nd 911, and the District Court for the Southern District of Iowa, Southern Division, 58 U. S. P. Q. 54, 42 U. S. P. Q. 427, 35 U. S. P. Q. 150, and 33 U. S. P. Q. 466. Such findings should not be disturbed by this Court, (*Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Co.*, 60 U. S. P. Q. 386, 388; *Williams Co. v. United Shoe Machinery Corp.*, 316 U. S. 364, 367), and the issues herein should be limited to the determination of infringement of the patents.

It is urged that in presenting this petition, respondent does not desire a retrial of the facts, but only a proper application of law which has been established with respect to these patents, in the determination of infringement in this cause.

Machine Patent.

The machine of this patent is essentially a root cutting machine and in this respect it differs from all sewer cleaning machines of the prior art. Petitioner started where the prior art machines left off and created for the first time a new combination of elements which in operation will not only perform the functions of the prior art devices, which is that of merely ramming or dislodging the stoppage in sewers to release the same, but in addition, will perform, for the first time, the operation of cutting large and small roots of trees and shrubs which penetrate and

are frequently found in sewer pipes and which create therein the main and most frequent cause of sewer stoppage.

The Circuit Court of Appeals for the Sixth Circuit in its decision in the case of *Blanc v. Curtis*, 119 Fed. 2nd 395, recognized petitioner's contribution in the art, wherein it stated on page 396:

"However, the problem of cutting roots in sewers is a different problem from that of merely ramming out debris collected in the sewer, *and this new and valuable result was accomplished for the first time in Blanc.*"*

A specific embodiment of petitioner's invention is shown in the patent (R. 213; see also Sheet 1 at end of brief). From the drawings and description it clearly appears that the machine comprises: an elongated flexible element 49 of coiled spring wire which is capable of being inserted to any desired length in a sewer pipe and when the end thereof is held against rotation by the cutter 56 engaging the roots, of being wound to high tension; a reel 28 for holding and storing the spring wire element; a guide 20 on the axis of the reel through which the spring wire element passes when it is fed onto and off of the reel; a motor 57 for imparting rotary movement to the reel and to the spring wire element; and an anti-kinking device in the form of a tubular member 35 which imparts to the portion of the spring wire element lying between the reel and the guide the formation of a crank and which maintains this crank formation against kinking under conditions of high tension so that at all times during the operation of the device, the spring wire element may be turned by the crank and thereby be wound up to create a high tension required for the cutting of the roots. This tension when released func-

*Emphasis ours unless otherwise indicated.

tions to exert a high and quickly applied force to the root cutter 56 which is mounted on the inner end of the spring wire element, with the result that the roots are quickly and effectively removed from the sewer.

The action of the high tension spring is more particularly described in the patent (R. 214 (p. 2 of Patent), lines 49 to 59, Col. 2).

Petitioner's commercial embodiment of the patent, Exhibit IV, reproduced for convenience on Sheet 2 at the end of the brief, answers to the above description, the same embodying an internal type of reel, however, instead of the external type of reel of the specific disclosure of the patent.

The Court of Appeals for the Sixth Circuit, however, in the case of *Blanc v. Curtis*, 119 Fed. 2nd 395, held that such reels are equivalent and stated at page 397:

"In appellee's machine (Patent 1,963,561, issued to Sanger), the shaft is coiled inside an annular space within the periphery of the drum or reel rather than wound on a hub in the usual manner. Appellant's commercial embodiment of the patent also uses an internal reel rather than the external reel shown in the drawings and we regard the difference between the reels as immaterial."

Accordingly, the Court of Appeals in the case of *Blanc v. Curtis* necessarily decided that claim 4, then in issue, was not limited to a machine in which an external type of reel was employed and ascribed to petitioner's invention, as defined by said claim, a device embodying an internal type of reel used in conjunction with a tubular anti-kinking device.

In deciding the case of *Blanc v. Curtis*, the Court of Appeals had occasion to refer to the decision of the Dis-

trict Court for the Southern District of Iowa, Southern Division (8th Circuit), in the case of *Blanc v. Weston, et al.*, 42 U. S. P. Q. 427, in which claim 4 of the Machine Patent was similarly construed.

In the more recent cases of *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54, the same District Court, in recognizing the precedent established by the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis*, with respect to claim 4, held the defendant's devices to infringe the Machine Patent. Defendant Longstaff's machine corresponded substantially to petitioner's commercial embodiment of the patent.

As stated by the court at page 54:

"Despite what has been said in argument, it seems to me that the machines, the accused machines here, are studied attempts to make changes in Mr. Blanc's disclosures in his patent and in his merchantable machine, and I can't see very much difference in them. They are based upon the same general mechanical arrangement."

Further,

"Of course that just ends the argument as against the infringement by Mr. Longstaff here, because the machine has all of the other elements, unless it would be the fact that by reason of the reel being in the nature of a cage, instead of reeling the coil on the outside he takes the coil from the inside of the reel. I can't see where that would make any mechanical difference. *Certainly there is no differentiation of that matter in the claims of the patent.* Take those two things out and as far as Mr. Longstaff's patent is concerned, they are practically identical."

The structure of respondent's sewer cleaning machine can be best determined from Exhibit V (R. 220, 221) and

Exhibit VI (R. 222; see also Sheet 2 at end of brief), and as constructed contains all of the novel characteristics of the invention of the Machine Patent and fully responds in every respect to the definition which the Courts in the cases above identified have given to the Blanc invention.

As shown on Sheet 2 at the end of the brief, it is clear that the machine employs a flexible high tension spring element 4 which is mounted upon a storage reel 21 driven through the medium of a motor (R. 220, 221). The spring element passes through a tubular member 27 mounted on the axis of rotation of the reel, and which serves to provide a guide for the spring element at the front of the machine while paying out and retracting the same. The tubular member also serves as a means to prevent kinking of the high tension spring element and disposes the same in crank-like formation whereby torsional energy may be wound into the flexible spring element.

The operation of respondent's machine is described in Exhibit V (R. 220, 221).

Of the seven claims in issue, typical claims 4, 8 and 10 are set out for convenience on Sheet 1 at the end of the brief. It will be observed that respondent's device responds literally and in spirit to the terms of said claims. The device incorporates an internal type of reel which the Courts in the cases referred to above have held to be equivalent to the external type of reel of the specific embodiment of the invention, as disclosed in the drawings. It is further observed that the claims in issue are not limited with respect to the type of reel forming an element in the combination.

Respondent's machine also incorporates an anti-kinking tubular member 27 performing the same function in and cooperating with the other elements of the assembly as

specifically taught by petitioner in his Machine Patent and which is the very element which the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis* held was covered by claim 4 of the Machine Patent. This means is of vital importance in the assembly to prevent kinking of the cable at all times in that part of the machine which the District Court in the cases of *Blanc v. Longstaff* and *Blanc v. Smith* (58 U. S. P. Q. 54) (8th Circuit) described as the vulnerable spot in the entire mechanism.

It is also clear from respondent's own admissions on cross-examination that his device infringes the Machine Patent (R. 162-167; also see Petition for Rehearing R. 268-273).

The Court of Appeals for the Sixth Circuit in this cause, however, failed to follow the established precedent of its own decision in *Blanc v. Curtis* and in a perfunctory approval and adoption of the District Court's conclusions, held respondent's device not to infringe the claims in issue, although the Court obviously intended to adhere to the determinative principles enunciated in its prior decision in *Blanc v. Curtis*, as evidenced by its specific reversal of the District Court's decision with respect to claim 4 as being in contravention of the decision of the Court in that case.

The decision in this cause is clearly against the evidence in the case and the physical facts clearly demonstrate the unsoundness of the same (See Petition for Rehearing R. 257).

The decision of the Court of Appeals for the Sixth Circuit in this cause, with respect to infringement, is in clear conflict with its prior decision in *Blanc v. Curtis* and the decisions within the Eighth Circuit. Such lack of uniformity and inconsistency between the decisions with

respect to infringement of the Machine Patent has caused and will cause the general public undue hardship and uncertainty in determining what machines constitute infringements of the same, and will lead to unnecessary and expensive litigation unless such conflict is determined by this Court.

Cutter Patent.

The invention of this patent relates to a specially designed and constructed cutter which is capable of functioning as the cutter element attached on the end of the high tension spring element of the root cutting machine.

The cutter of the Patent (R. 217), the drawing for which is reproduced for convenience on Sheet 1 at end of brief, comprises a head adapted to be attached to the flexible spring element at one end and having blades attached to the other end for cutting roots and removing debris from sewers. The assembly is characterized as embodying the following essential features, namely—

(a) The blades must diverge outwardly from the mounting hub;

(b) The blades must be capable of flexing inwardly and outwardly in such manner that they may be pressed together so as to enter and pass through small restrictions in pipes, such as encountered at inlet openings and at joints and bends therein, and when once inside to again expand to their original positions;

(c) The blades must have rearwardly inclined cutting edges which will exert a holding action for stopping the end of the wire spring to cause the same to wind up to create the required high tension therein, and at the same time exert a draw cutting action to sever the roots when the spring tension is released and high rotary motion is imparted to the cutter;

(d) The leading ends of the cutter must be turned inwardly to produce a sled-runner action in sliding over and passing restrictions and bends in the pipe; and

(e) The blades must have such flexibility as to be capable of responding to centrifugal force produced by the high speed rotary motion created when the high-tension spring is released, so as to be expanded by such force to a maximum divergence and to thereby engage the inner surface of the pipe or sewer, irrespective of the size thereof, and to cut the roots flush with the pipe surface, with the result that the pipe is entirely freed of all roots growing therein.

The action of the cutter is described in the specification of the patent (Rec. 218 (p. 2), lines 6 to 19, Col. 1).

Petitioner's Cutter Patent was recognized by the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis*, 119 Fed. 2nd 395, as covering a pioneer implement and should be liberally construed. As was therein stated on page 399:

"Appellant's cutter is a pioneer implement, and should be given a construction sufficiently broad to realize the purpose of the patent. It is a meritorious improvement, substantially advancing the art, and is entitled to a liberal construction. *National Battery Co. v. Richardson Co.*, 6 Cir., 63 F. 2d 289, 293. Appellant's and appellees' cutters are substantially identical, operating on the same principle and accomplishing the same result in substantially the same way. Cf. *Sanitary Refrigerator Co. v. Winters*, 280 U. S. 30, 50 S. Ct. 9, 74 L. Ed. 147; *Sun Ray Gas Corp. v. Bellows-Claude Neon Co.*, 6 Cir., 49 F. 2d 886. The use of a knife practically identical with one of the accused cutters was held in *Blanc v. Weston*, 35 U. S. P. Q. 150, to violate the injunction issued in *Blanc v. Weston*, 33 U. S. P. Q. 466."

The scope and interpretation given to claims 3 and 6 by the Court of Appeals in holding the same infringed by

appellee's cutters conforms in all respects to that of the District Court for the Southern District of Iowa, Southern Division, in the cases of *Blanc v. Weston*, 33 U. S. P. Q., and *Blanc v. Weston*, 35 U. S. P. Q. 150, referred to and acquiesced in by the Court of Appeals in deciding that case.

As with respect to the Machine Patent, the case of *Blanc v. Curtis* established a precedent which was followed in the cases of *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54, wherein the District Court for the Southern District of Iowa, Southern Division, again reiterated its position with respect to the Cutter Patent in holding claims 1-6, inclusive, valid and infringed, and stated at page 55:

“* * * I don't know whether the thought originated when I wrote the opinion or not, but whether I did then or not, I have since felt—and I am glad to see it was the same thought held by the writer of the Opinion of the Sixth Circuit Court (49 U. S. P. Q. 282), Judge Allen—that Mr. Blanc in his knife has a basic, fundamental and pioneer patent.”

Respondent's cutters are fairly represented in Exhibit V (R. 220) and Exhibit VII (R. 223; see also Sheet 3 at end of brief), and possess all of the peculiar characteristics and special features above enumerated which identify petitioner's contribution in the art, as is apparent from the descriptive matter appearing on Exhibit V (R. 220, 221). The cutters are designed to be introduced through a small opening of a pipe, and then expand to the diameter of the large tiles under the action of centrifugal force, and finally engage the roots, exert the holding action requisite for winding a high tension in the flexible element (where such action is necessary), and chop the roots flush with the tile wall.

The function and operation of the cutters is identical to that of petitioner's patented cutters (R. 158, 159, 160).

While respondent's cutters are formed with the blades in opposite relation to one another, this feature was considered immaterial by the Court of Appeals for the Sixth Circuit in the case of *Blanc v. Curtis*, 119 Fed. 2d 395, in conformity with the broad interpretation placed upon claims 3 and 6 then in issue.

The Court therein stated on page 399:

"In view of the construction that we give this patent we do not consider these variations material, nor that the rearward inclination of the blades as distinguished from that of the cutting edges is the gist of appellant's invention. We agree with the Court of Appeals for the Eighth Circuit (*Blanc v. Weston*, 109 F. 2d 911, 912) that an essential characteristic of the Blanc cutter patent is a thin flexible cutting member of very high resilience. * * *"

Similar cutters were held to be infringements of the patent in the case of *Blanc v. Curtis* (Exhibits X-A to X-E; R. 224, 225, 226; See also Sheet 3 at end of brief).

That the Court of Appeals for the Sixth Circuit intended to decide the present case in contravention of the earlier decision of the Court in *Blanc v. Curtis*, is negated by the statement of the Court in its decision. Accordingly, the decision in this cause now stands in direct conflict with the Court's prior decision.

The decision is likewise in conflict with the District Court's decisions in *Blanc v. Weston*, 33 U. S. P. Q., and *Blanc v. Weston*, 35 U. S. P. Q. 150, (8th Circuit), in which cutters practically identical to the cutters of the *Blanc v. Curtis* case were held to infringe the patent. (See *Blanc v. Curtis*, 119 Fed. 2d 395, 399).

The decision is also in conflict with the decision of the District Court in the cases of *Blanc v. Longstaff* and *Blanc*

v. *Smith*, 58 U. S. P. Q. 54, 55 (8th Circuit) which specifically referred to the decision in *Blanc v. Curtis* as a precedent in holding the accused cutters to infringe the patent.

While the Court of Appeals for the Sixth Circuit in deciding the case of *Blanc v. Curtis* referred to and agreed with the conclusions reached by the Court of Appeals for the Eighth Circuit in the case of *Blanc v. Weston*, 109 Fed. 2d 911, it nevertheless gave to the claims of the Cutter Patent an interpretation broader than accorded claim 6 by the Court of Appeals for the Eighth Circuit in that case. The cases may be reconciled, however, as to infringement, for the reason that the cutter involved in the *Weston* suit embodied rigid blades, whereas the blades of the cutters in the *Curtis* suit were flexible and resilient.

The situation with respect to the Cutter Patent, as it now presents itself to the public generally, is an array of conflicting decisions within the Sixth and Eighth Circuits, whereby it is impossible to determine whether or not infringement exists with respect to any particular cutter. It must be recognized that the hopeless confusion which now exists relative to the question of infringement of the Cutter Patent exists because of the fact that the District Court in this cause completely failed to follow its own appellate court's decision in the earlier case of *Blanc v. Curtis*, 119 Fed. 2d 395, as a precedent, and the Court of Appeals' acceptance and acquiescence in the District Court's conclusions in apparent disregard for the legal precedent established by said earlier case of *Blanc v. Curtis*, though it evidenced an intention not to decide the present cause in contravention to the decision of the earlier case, and even though the District Court of the Eighth Circuit in the cases of *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54, *Blanc v. Weston*, 35 U. S. P. Q. 15 and 33 U. S. P. Q. 466, has

consistently and uniformly construed and interpreted the claims thereof in accordance with the construction placed upon them by the Circuit Court of Appeals in said earlier case of *Blanc v. Curtis*.

No attempt was made by the Court of Appeals in the present cause to distinguish over its prior decision and as a result the public is faced with irreconcilable decisions within the Sixth Circuit with respect to infringement of the Cutter Patent because of the fact that the cutters in both instances are clearly similar and the rule of law of the earlier case is equally applicable to respondent's cutters.

If the decision in the present cause overrules the position established by the Court in its former decision in *Blanc v. Curtis*, the public at large has been unadvised in this case and is unable from these decisions to determine which decision is to be recognized as authority with respect to infringement. Should this situation continue and the public determine of its own accord what decision of the Sixth Circuit is to prevail with respect to the interpretation of and the construction to be given to the Cutter Patent, confusion and uncertainty will continue, inasmuch as a determination one way or the other will be inconsistent with either the decision of the Circuit Court of Appeals for the Eighth Circuit in *Blanc v. Weston*, 109 Fed. 2d 911, or the decisions of the District Court in cases of *Blanc v. Weston*, 33 U. S. P. Q. 466, *Blanc v. Weston*, 35 U. S. P. Q. 150 and *Blanc v. Longstaff* and *Blanc v. Smith*, 58 U. S. P. Q. 54.

The utter lack of uniformity and consistency in the application of established law with respect to infringement by the Court of Appeals for the Sixth Circuit, and the conflicts existing between decisions of the Courts of the Sixth Circuit and Courts of the Eighth Circuit in interpreting the claims of the Cutter Patent necessarily places the public at large in an exceedingly embarrassing position with re-

spect thereto, thus clearly presenting a situation requiring the exercise of this Court's powers to determine the proper scope and interpretation of the claims of that patent.

For the reasons above stated, it is urged that the petition for writ of certiorari be granted.

Respectfully submitted,

GORDON F. HOOK,
Counsel for Petitioner.

DEFENDANT'S ACCUSED DEVICE. EXHIBIT VI.

PLAINTIFF'S COMMERCIAL MACHINE SHEET-2.

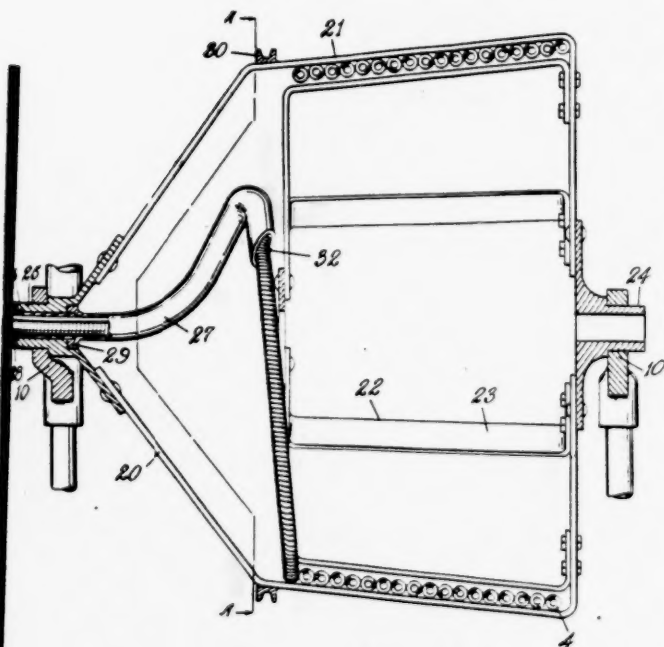


Fig. 1

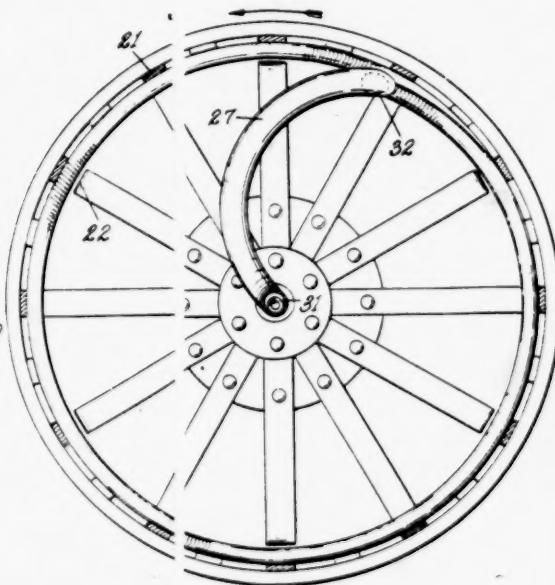
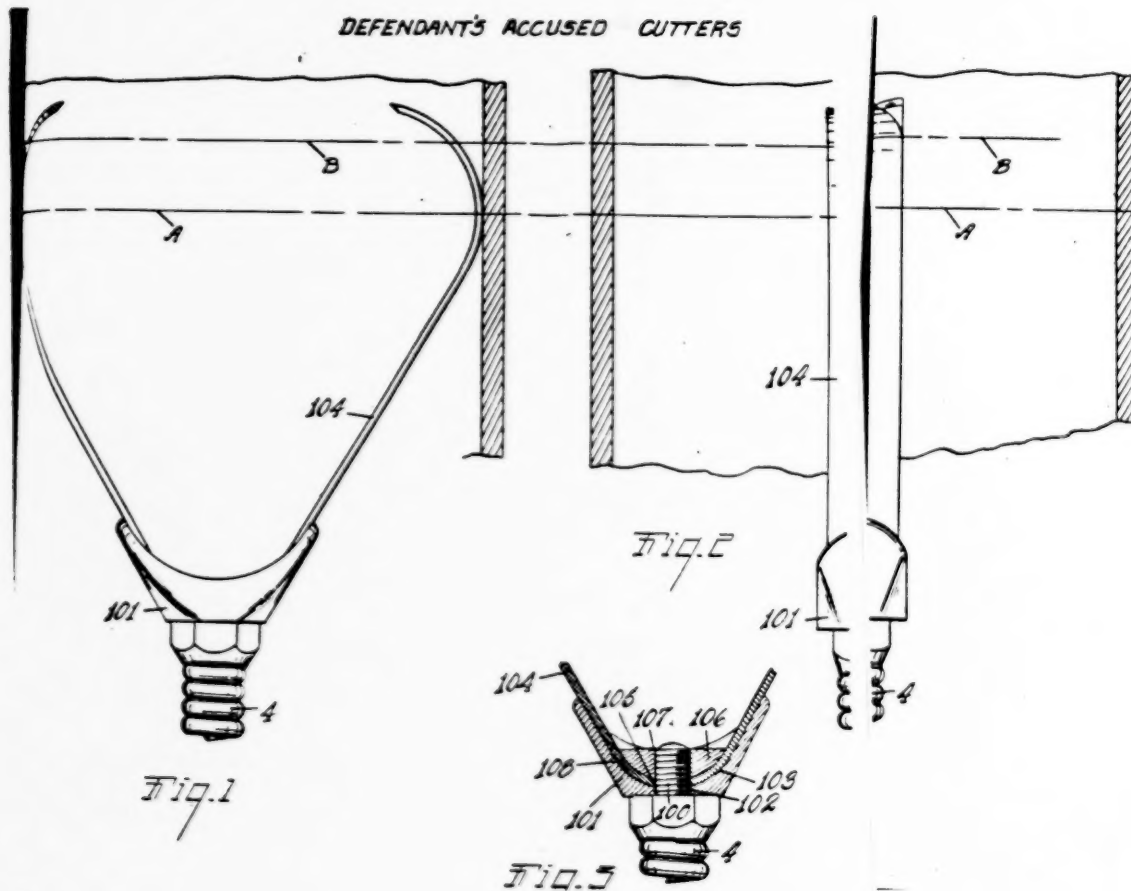


Fig. 2



DEFENDANT'S ACCUSED CUTTERS



CUTTERS HELD TO INFRINGE CLAIMS
3 AND 6 OF CUTTER PATENT IN CASE
OF BLANC VS CURTIS, 119 F.2d 395

SHEET-3.

EXHIBIT X-A



EXHIBIT X-D

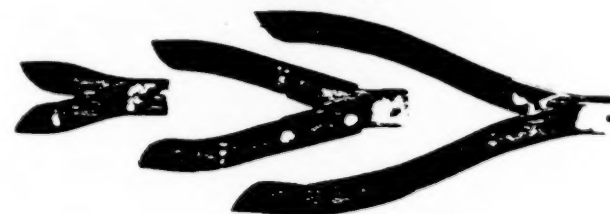
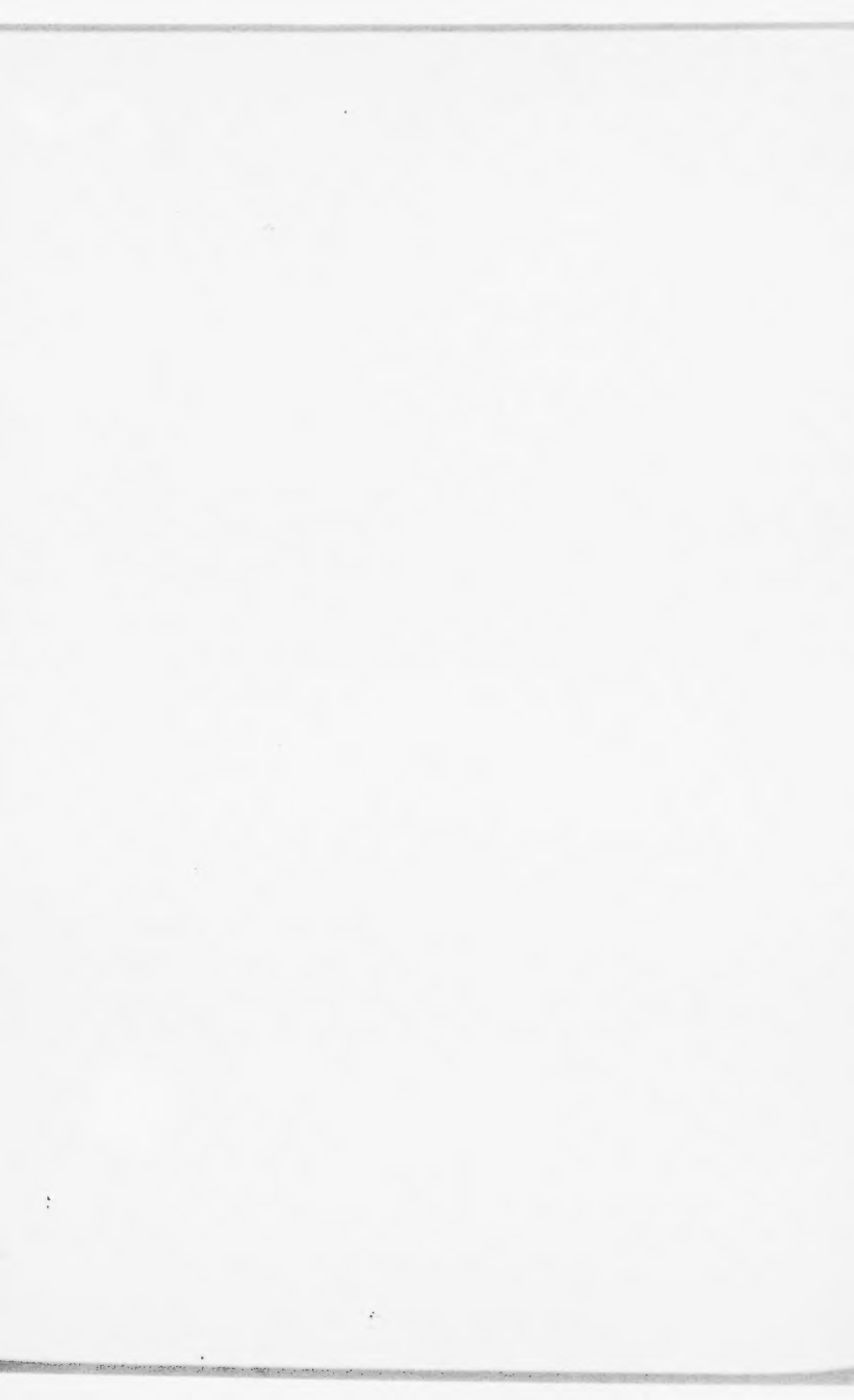


EXHIBIT X-E





(22)

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CLERK

United States of America

In the

Supreme Court of the United States

OCTOBER TERM, A. D. 1943

No. 983

SAMUEL O. BLANC,
Petitioner,
vs.
AL CAYO, doing business as CAYO ELECTRIC
SEWER MACHINES,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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— — —

**RESPONDENT'S BRIEF IN OPPOSITION TO
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— — —

STATEMENT OF THE CASE

Respondent cannot approve of the petitioner's statement of "Questions Presented" inasmuch as respondent believes and contends that:

1. There is no real conflict between the decision of the Court of Appeals for the Sixth Circuit in this cause and

the decisions of the Court of Appeals for the Eighth Circuit or the District Court in the Eighth Circuit when such decisions are analyzed;

2, 3. There is no conflict in the decisions of the Court of Appeals for the Sixth Circuit in the present case and its decision in *Blanc v. Curtis*, 119 F. (2d) 395;

4. There is no justification for petitioner's statement to the effect that the Court of Appeals perfunctorily approved the District Court's decision, and again respondent urges that there is no conflict between the decision of the Court of Appeals in this case and its decision in *Blanc v. Curtis*, but if there were the later decision would be controlling.

SUMMARY OF ARGUMENT

We shall argue that the petition should be denied because the reasons for granting the writ urged by the petitioner are not, when the decisions are analyzed, such as to merit a review by this Court.

Petitioner asserts,

"1. Conflict with prior decision of the Court of Appeals for the Sixth Circuit."

We shall argue that there is no actual conflict.

Petitioner asserts,

"2. Confusion and conflict exists between decisions of the Court of Appeals for the Sixth Circuit and prior decisions of the Court of Appeals for the Eighth Circuit and the District Courts within said Circuit."

We shall argue that there is no such conflict when the decisions are properly analyzed.

Petitioner asserts,

“3. Public interest involved.”

We shall argue that the public is not more interested in this case than it is in any case involving a patent.

ARGUMENT

We adopt the petitioner's plan of referring to the Re-issue patent 22,113 as the machine patent and the cutter patent 2,069,871 as the cutter patent.

The record in this case was presented without regard to the record in any other case involving the reissue machine patent or the original thereof, No. 2,111,527, or the cutter patent. The petitioner, patentee Blanc, testified and his testimony in this case is highly important. There is nothing in the record as to any structures involved in the decisions of the Court of Appeals for the Eighth Circuit or the District Court in the Eighth Circuit. Photographs of certain cutter exhibits (X-A, X-D and X-E) held to infringe in *Blanc v. Curtis*, the Sixth Circuit case, are reproduced at R. p. 224, 225 and 226. Defendant's Exhibit Y (R. 245), circular entitled "Sanger Electric Motor Mole," illustrates the machine held not to infringe Claim 4 of the machine patent, in the *Blanc v. Curtis* case. See also Sanger patent 2,167,268, Defendant's Exhibit Z (R. 247) for further details of that machine held not to infringe.

Petitioner has appended to his brief drawings entitled "Defendant's Accused Device Exhibit 6" (R. 222). The photograph of plaintiff's commercial machine forming part of this appended sheet is not an exhibit in the case.

Throughout this litigation petitioner has attempted to present his patent as being something which turned failure into success but that is shown not to be the fact by the record in this case, and so far as petitioner may have had commercial success with the machine, it is not due to the disclosure of the machine patent but to something entirely different. As a matter of fact, this record shows

that only two models were ever built according to the disclosure of the patent (R. 60-61) and these were operated for about 60 days. One of them at least the original machine, was destroyed and parts used in building the present commercial machine. The second model was not produced or accounted for at the trial. The original machine was built in March, 1934, and discarded about the time the application for patent was filed. Therefore, the machine patent is a so-called paper patent. *W. F. & John Barnes Co. et al. v. International Harvester Co.*, 58 USPQ 131, 51 Fed. Supp. 254.

The arguments made in the prosecution of both the original machine patent and the reissue machine patent (File Wrapper Exhibits E and D) were not based on the disclosures of the patent applications, but on the later developed commercial machine. Petitioner's persistent efforts to credit the commercial machine with the disclosure of the patent, or the patent with the commercial machine, are unwarranted and must be disregarded. The record shows that the size and quality of the materials used in the flexible shaft or cable and the quality of wire and the initial tension wound into the flexible shaft are the important factors, and that it is merely a matter of mechanics or engineering or selection (R. 68-69).

As to the cutter, it is again a matter of selection of materials by the cut-and-try method (R. 81). The flexibility or resilience of the cutter blades is merely a matter of adaptation for the particular job, and the petitioner-patentee, when asked what he meant in his patent when he stated the blades were flexible, answered (R. 81),

"They are flexible enough for the purpose for which they are designed, that is to be able to compress them a reasonable amount."

When pressed on this subject of "comparatively flexible material" he states:

"Compared to a tool that would be too stiff to use. It would have to be flexible enough to be usable for the purpose for which it was designed and intended" (R. 81-82).

See also R. 86. These points are brought out as they are illuminating in view of petitioner's contentions.

Decisions of District Court and Court of Appeals in Present Case

Before any comparison can be made with decisions of other courts it is important to get a complete understanding of the decision of the District Court and the Court of Appeals in the present case. The Findings of Fact and Conclusions of Law of the District Court (Judge Raymond) are found at R. 18-28, the Final Judgment appearing at R. 29, reported at 50 F. Supp. 552. The respondent's machine, held not to infringe, is illustrated in a series of photographs, Exhibits I-1 to I-8 (R. 229-236); see also Exhibits J-1 to J-8 (R. 237-244) in which descriptions of the photographs and operation of the machine appear in connection with the several views. These exhibits will be found helpful in considering the Findings of Fact and Conclusions of Law of the District Court.

The Findings of Fact of the District Court are so simple and clear cut that a review of them will show that the District Judge had a clear, comprehensive and complete grasp of the patents in suit and the defendant's machines. The petitioner in Paragraph 4 of "Questions Presented" refers to the Court of Appeals' "perfunctory approval" of the District Court's decision in this case. It is respectfully urged that there is no possible excuse for petitioner's

reference to the decision of the Court of Appeals as "perfunctory approval of the District Court's decision."

After the decision of the Court of Appeals, reported 60 USPQ 89, 139 Fed. (2d) 695, the petitioner filed a petition for rehearing (R. 257) urging, as it is here urging, that the decision of the Court of Appeals conflicted with its prior decision in *Blanc v. Curtis*, 119 Fed. (2d) 395, and in a rather lengthy brief seemed to imply that the Court of Appeals had not given due and proper consideration to the case. It is submitted that there is no possible justification for this position. The Court of Appeals commented on the most painstaking and illuminating findings of fact of the District Judge, and his conclusion that all of the controverted claims of the machine patent 4, 5, 7, 8, 9, 10 and 11 were invalid for lack of invention and that the appellee's (respondent's) machine does not infringe any of the claims. The Court of Appeals further pointed out the finding of the District Court that appellee's (respondent's) cutter blades constituting Exhibits A, S, T and V infringe none of the six claims of the cutter patent, and we find the statement by the Court of Appeals:

"The findings of fact of the District Court from which its conclusions were drawn are supported by ample evidence and are certainly not clearly erroneous."

The Court of Appeals referred to the fact that the District Court had held Claim 4 of the machine patent invalid for lack of invention over the prior art and held that this finding was erroneous and in contravention of the decision of the Court of Appeals in *Blanc v. Curtis*, wherein the same claim of the original machine patent was held valid but not infringed.

The Court of Appeals specifically found that the respondent's machine is well defined in Finding of Fact 10

(R. 21), that its differentiation from the arrangement and functioning of the parts in the disclosure of the patent is clearly pointed out in Findings of Fact 11 and 17, and that

“The District Court, therefore, correctly concluded that none of the claims of the Reissue Patent No. 22113 read upon the accused machine of the appellee. In view of this conclusion, it is deemed unnecessary to consider the validity of Claims 5, 7, 8, 9, 10 and 11 of the Reissue Patent No. 22113, or to refer to or discuss the prior art.”

The Court of appeals pointed out that the cutter blades in the structure disclosed in the cutter patent are accurately described in Finding of Fact 21 and that the cutter blades in the appellee's (respondent's) structure are accurately described in Finding 22, saying,

“* * * the differentiation in the respective cutter blades appears from these descriptions, as well as from the statements of the District Court in Finding No. 23.”

The Court of Appeals then added,

“The conclusion reached by the District Court that none of the six claims of the cutter patent in suit are infringed by the cutter blades of appellee's structure was obviously correct.”

Certainly, there is no justification whatever for referring to the decision of the Court of Appeals as “perfunctory approval” of the District Court.

We have in this case a situation such as referred to by this Court in the very recent decision in *Goodyear Tire & Rubber Co., Inc. v. Ray-O-Vac Company*, 60 USPQ, 386, 88 L. Ed. Advance Opinions 475, where the language of this Court is exactly in point:

“The Circuit Court of Appeals re-examined the findings in the light of the evidence and accepted

them. It must be a strong case in which this court will set aside these concurrent findings of two courts. We think this is not such a case."

In *Williams Manufacturing Company v. United Shoe Machinery Corporation*, 316 U. S. 364, 86 L. Ed. 1533, this Court in discussing findings of fact said:

"These are findings of fact, despite petitioner's apparent contentions to the contrary, and we will not disturb such concurrent findings where, as here, there is evidence to support them."

To the same effect see *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U. S. 405, 52 L. Ed. 1122.

The evidence in this case abundantly supports all the findings of fact.

The respondent's machine, which is very clearly defined by the District Court in Finding of Fact 10, is illustrated in the photographs Exhibits I and J series (R. 229-242) hereinbefore referred to. The operation of the machine and the photographs are described by the witness Ullrich (R. 111-110) and by the respondent, Cayo (R. 137-146). The Court of Appeals comments,

"Upon the trial in the District Court, many exhibits were received in evidence and the testimony of the appellant inventor and other experts in the field of litigation was adduced."

Finding of Fact 11 (R. 23) is to the effect that there is nothing corresponding to the arrangement and functioning of parts in the disclosure of the patent in suit in defendant's machine, Exhibit W. The District Court points out that the cable, being maintained in a single layer of coils in defendant's machine, permits the use of the tubular arm to prevent the cable from shooting out of the reel when the cable is subjected to torque stress; that the

braking clutching action is effective to that end while permitting the cable to be manually pulled out or pushed into the reel, but that when excessive torque occurs the locking clutching engagement takes place and the belt automatically loosening permits slippage and relieving of the excess torque.

In Finding of Fact 12 (R. 23) the District Court points out that the machine patent is in a crowded art, and this is in accordance with the finding of the Court of Appeals in *Blanc v. Curtis*.

Finding of Fact 17 (R. 24-25) points out that the defendant's structure differs substantially from the structure disclosed in the patent in suit, which is in a crowded art, and that the claims cannot be given a range of equivalents including anything not substantially identical with the means described in the patent. Further, it states,

"Defendant's machine does not embody a reel nor does it embody an anti-kinking device such as is disclosed in the patent. In the patent, the anti-kinking device is in the form of a tubular shaft connected with a guide and extending outwardly to the reel and overhanging the reel in the shape of a gooseneck. In addition to that, the pawl and ratchet connection for this gooseneck to the reel and the associated brake means are an essential part of the disclosure and are essential to the winding of the cable upon and unwinding from the reel."

Then follows the statement,

"Defendant's distributor does not function as does the anti-kinking device of the patent. In defendant's machine, the distributor or tubular arm is so arranged as to purposely cause a kinking at the end of the arm to secure a braking clutching engagement to prevent projection of the cable from

the reel and a locking clutching engagement in the event of excess torsional stress in the cable."

In Finding 18 the District Court held the claims in suit invalid for lack of invention over the prior art and that

"None of these claims can be read upon the defendant's machine charged to infringe" (R. 23).

Finding of Fact 21 of the District Court (R. 27) describes the structure of the cutter patent as comprising a chuck having a V-shaped notch or blade seat in which blades are wedgingly clamped by means of a clamping wedge whereby the blades are individually adjustable to vary their angle relative to the axis of rotation of the cutter. The Court points out that these blades are described as being cut out of "comparatively flexible material such as spring steel," and as having the outer ends of their cutting edges curved outwardly and rearwardly of their line of advance to form a curved cutting edge.

In Finding of Fact 22 (R. 27) the blades of defendant's cutter are described as being of spring stock, the two blades being integrally formed of a strip of flat stock bent to U shape. It is pointed out that they are in exact opposition and not rearwardly inclined relative to their axis of rotation or in the direction of rotation; that the ends of the blades are curved inwardly toward their axis of rotation and that the cutting edges of these intumed ends are beveled or rounded; that the chuck or cutter head has a U shaped recess, the bight of the blades being of the same curvature as the socket; that the clamping block is of the same curvature so there is no wedging action but merely a clamping action. The District Court further points out,

"The two blades are exactly opposed and their cutting edges are parallel to the axis of rotation. There is no draw cut such as contemplated by the

patentee-plaintiff with his cutter blades rearwardly inclined relative to the axis of rotation or direction of rotation."

Finding 23 (R. 28) is to the effect that defendant's blades are not seated at an angle relative to the longitudinal axis of the head as described and disclosed by Blanc, and that therefore defendant's blades have no similarity to the patent in suit except for the in-curved or leading ends of the blades.

Finding of Fact 24 (R. 28) is that none of the six claims of the cutter patent can be construed to read on any of defendant's structures charged to infringe.

These points have been discussed at some length in order to facilitate the comparison of the decision of the District Court and Court of Appeals in this case with *Blanc v. Curtis* and the decisions in the Eighth Circuit.

Decisions in Present Case Not in Conflict with *Blanc v. Curtis*

The decision of the District Court in *Blanc v. Curtis* does not appear to have been reported. The bill in that case on the cutter patent was filed November 19, 1937. The original machine patent issued March 15, 1938, and was brought into the suit. In June, 1939, the District Court rendered its decision holding Claim 4 of the machine patent valid but not infringed and Claims 3 and 6 of the cutter patent valid and not infringed. The Court of Appeals affirmed the District Court as to Claim 4 of the machine patent but reversed the District Court on the matter of infringement of Claims 3 and 6 of the cutter patent.

The decision of the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis* was rendered December 17,

1941. The Court pointed out that the use of machines of this type was old; in fact, in Finding of Fact 12 in the present case (R. 23) the District Court points out that Blanc had been familiar with flexible coiled wire sewer cleaning "snakes" since 1927. The petitioner urged everything that is here urged upon the Court of Appeals in *Blanc v. Curtis*, and the Court summarized that the machine patent was in a crowded art and that anti-kinking devices were old.

In discussing the high degree of torque which the petitioner stresses, the Court of Appeals pointed out that the use of a motor produces higher torque, but that increased torque resulting from power operation was not patentable; that the problems of kinking resulting from increased torque differed only in degree from those dealt with by the prior art; and that therefore the claim of the patent could not be given a construction broader than the teaching of the patent as shown in the drawings and specification. It was stated that where a patentee had secured a patent in a crowded art for a combination of elements in prior use the range of equivalents includes "nothing not substantially identical with the means described in the patent."

The Court of Appeals found that the machine there accused had an anti-kinking device which served the same purpose.

Certainly, there is nothing in the District Court's findings of fact or the decision of the Court of Appeals in the present case which in any wise conflicts with this finding.

The same is true in connection with the cutter patent, Claims 3 and 6 of which were held infringed in *Blanc v. Curtis*. The Court of Appeals in that case could not have

intended to decide and did not decide that Blanc's inventive step resided in providing highly resilient blades. If that is all there is to the cutter patent, then it is clearly invalid because the patent does not define the degree of resilience or flexibility; the claims do not define the degree of resilience or flexibility of the blades; and the patentee (petitioner) himself states that there is nothing in the patent to indicate how thin, how thick, how flexible or how resilient the cutter blades are supposed to be, except that they are resilient enough to do the job or to be inserted through an opening in the tile and then opened out. Portions of the patentee's (petitioner) testimony on this subject have been previously referred to (but see R. 81, 85, 86 and 88).

Had resilience been construed to constitute the inventive step the patent would have to be held invalid under the decisions in *Schriber-Schroth Company v. The Cleveland Trust Company*, 305 U. S. 47, 83 L. Ed. 34, and 311 U. S. 211, 85 L. Ed. 132, and *United Carbon Company et al. v. Binney & Smith Company*, 317 U. S. 228, 87 L. Ed. 232.

The Court of Appeals pointed out in *Blanc v. Curtis* that the Curtis knives all disclose blades fixed to the end in a diverging manner with their free ends inclined inwardly towards the axis of rotation, and added:

"As to the inclination from the head and rearwardly, the knives differ in varying degrees from the patented article. In view of the construction that we give this patent we do not consider these variations material, nor that the rearward inclination of the blades as distinguished from that of the cutting edges is the gist of appellant's invention."

Then follows the statement,

“We agree with the Court of Appeals for the Eighth Circuit [*Blanc v. Weston*, 109 F. 2d 911, 912] that an essential characteristic of the Blanc cutter patent is a thin flexible cutting member of very high resilience.”

In *Blanc v. Weston*, 109 F. 2d 911, the party Blanc, petitioner herein, was urging that “thin” is a relative term and that defendant’s structure consisted of blades that were designed to cut and therefore had the element of thinness. This shows the great length to which petitioner is attempting to have his patent stretched, and the Court pointed out that relatively thin cutting blades for the same purpose were used long before Blanc entered the field. As a matter of fact, in the present case the District Court referred, in Finding of Fact 14 (R. 15), to the statement made by Blanc during the prosecution of his machine patent to the effect that prior to his invention plumbers’ snakes were used for cleaning drains or sewers, sometimes with a blade. This statement by the patentee shows that the statement in *Blanc v. Curtis* implying that prior to Blanc the only method had been to “ram out” debris collected in the sewer, was based on an erroneous conclusion, as evidenced by Blanc’s own statement in his file wrapper, Exhibit E, page 64.

The Court of Appeals in *Blanc v. Curtis* could not have intended to ignore the language in Claims 3 and 6 and that language was not ignored by the Court of Appeals for the Eighth Circuit in *Blanc v. Weston*. In that case Claim 6 only was involved and the Court pointed out (page 912, second column):

“It will be observed that the blades described in plaintiff’s patent are rearwordly inclined in the direction of their rotation. Plaintiff urges that

the ends of the blades in defendant's structure taper near the points and to that extent they incline rearwardly. But clearly, defendant's construction does not read upon plaintiff's patent in that regard."

As found by the District Court and the Court of Appeals in the present case, respondent's blades are in exact opposition, that is, there is no rearward inclination.

Petitioner urged upon the District Court and the Court of Appeals that the beveled ends of the blades in defendant's structure resulted in a rearward inclination. The Court of Appeals for the Eighth Circuit rejected that contention and it was rejected by both the District Court and the Court of Appeals in the present case. There is nothing in the decision in *Blanc v. Curtis* indicating any intention to hold that blades such as respondent's blades, found not to infringe, would come within the terms of either Claim 3 or Claim 6 of the cutter patent.

The Court of Appeals for the Eighth Circuit points out that Claim 6 defines the blades as set to produce a draw cutting effect, "said blades being inclined from said head and rearwardly relative to their direction of rotation." This feature was stressed during the prosecution of the application for the cutter patent, see Exhibit B, page 19. In urging the allowance of Claim 6 it was stated:

"Applicant has found that a great deal of the success of the cutter resides in the fact that the blades are fixed to the head and inclined rearwardly relative to their direction of rotation so as to produce a draw cut effect, * * *

"The new claim is believed to differ from any of the references cited in that it calls for the blades inclined rearwardly relative to their line of rotation."

Certainly, there is no conflict of decision between this present case and the decision of the Court of Appeals for the Eighth Circuit; they are in exact accord.

Claim 3 of the cutter patent, held valid and infringed in *Blanc v. Curtis*, is essentially the same as Claim 6, as it calls for the blades set to the head in a diverging manner, " * * the outer ends of the blades being inclined rearwardly relative to their direction of rotation, the outer ends of the cutting edges of the blades being further inclined rearwardly relative to their direction of rotation."

**No Confusion or Conflict Exists Between Decisions of Court
of Appeals for the Sixth Circuit and Prior Decisions of
Court of Appeals for the Eighth Circuit and the
District Court Within Said Circuit**

It is unnecessary to repeat the discussion of the decision of the Court of Appeals for the Eighth Circuit in *Blanc v. Weston* as we have pointed out the gist of that decision in our preceding discussion.

The decision of the Court of Appeals for the Eighth Circuit was on an appeal from a contempt proceeding reported *Blanc v. Weston*, 27 F. Supp. 530. Judge Dewey stated that since he had become acquainted with the patent (cutter patent) and the prior art and use he had been convinced " * * that a tool with the blades in direct opposition and so anchored to the base as to be incapable of being adjusted, do not infringe." He adds,

"And this thought was based upon a belief that the prior art, and especially the prior use of defendant's Exhibit 7, referred to in my original decree, discloses such an instrument or tool."

On the question of flexibility, he states:

"While flexibility was an important element in plaintiff's patent, it was not and could not be the

controlling element, as the prior art and the prior use, Exhibit 7, show and contain flexible blades."

We thus find the decision of the District Court in this contempt proceeding and the decision of the Court of Appeals for the Eighth Circuit in exact accord with the decisions of the District Court and the Court of Appeals in the present case.

The fact that the District Court in the present case did not stress resilience or flexibility is not important as that could not be decisive. Further than that, the record in the present case shows it to be merely a matter of cutting and trying, and securing the resilience desired for the particular job, or, as stated by the petitioner and patentee (R. 86),

"If it has a suitable degree of flexibility in this art, for this purpose, it is thin and flexible."

Blanc v. Weston, 27 F. Supp. 530, was a second contempt proceeding, decided April 15, 1939. The first contempt proceeding was decided September 30, 1937 (*Blanc v. Weston*, 35 USPQ 150), and the so-called new tool was held to infringe because the structure permitted the blades to become rearwardly inclined or to be adjusted to a rearwardly inclined relation. The Court commented,

"It is true that in its original construction and assembly the blades stand in direct opposition to each other and are not inclined rearwardly. But the slots in the first place are large enough to permit a variation of the blades in their inclination from a straight line and the lower ends of the blades have only a machine perforation to prevent the blades from getting out of alignment as held in the slot."

The Court then added,

“The situation is in keeping with that suggested by this court in its memorandum opinion that the use of a tool easily adjusted or available to be used with the knives inclined rearwardly is tending towards, if not actually, an infringement of the plaintiff's patent. * * * From this situation and the direct testimony of witnesses at the trial, I am abundantly satisfied that the employees of the defendant have used this device with the blades inclined rearwardly.”

There is no conflict in this decision with the decisions in the present case.

The original suit of *Blanc v. Weston*, decided May 12, 1937, is reported 33 USPQ 466.

There the Court stated:

“While defendant's drawing referred to may not show the deflected blades as described in plaintiff's claims, yet it shows that its construction could easily be altered so that it would become within the exact wordings of the patent.”

In discussing Claims 3 and 6 the District Court in that case refers to the “thin and flexible material” as additional elements for the blades, and the blades set to provide adjustments to meet situations in actual use. No adjustments are possible with respondent's blades and there is no conflict between this decision and the decisions in the present case.

Blanc v. Weston et al., 42 USPQ 427.

This case decided July 31, 1939, was based on the original of the reissue machine patent here involved. Claim 4 was held valid but not infringed. The accused machine was a Sanger machine and in holding this

machine not to be an infringement of the machine patent Judge Dewey was in accord with both the District Court and the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis*.

It does not appear from this decision whether the Court was talking about the machine disclosed in the patent or whether he was talking about the Blanc commercial machine, which is not the machine of his patent, when he commented:

“Having been successful in the attainment of his object, it is natural for Mr. Blanc to feel that he has a pioneer patent.”

Judge Raymond, in ruling on respondent's objections to certain questions based on the commercial machine (R. 48) stated:

“I think we all have the same understanding about the limitation of the effect of this witness' testimony. Of course, he should not enter into an improper field. I think I understand the purpose for which it is offered, and I have ruled rather definitely concerning the purpose for which it may be received. In the ultimate outcome of the case it won't make any difference, I think, because I understand very clearly that the commercial device is not the device of the patent. I am receiving the testimony with that in mind, so there will be no injury done.”

Judge Dewey uses the terms primary and pioneer patents and he comments that every patent is in one sense a primary patent. We are mentioning this as the term is unusual in our experience. The Court there found:

“The grooseneck member is the real heart of this element of plaintiff's combination patent. Not only do the specifications so show, but it was so

explained at the trial when differences between the Yohn patents and the Snow machine were being discussed."

The Court further pointed out that the results attained by defendant's machine were the same as plaintiff's but that identity of result is not the test, that defendant's machine does not have the same means nor do the different parts operate in the same manner.

Thus we find that this decision is not in conflict but is in exact accord with the decisions of the Sixth Circuit in *Blanc v. Curtis* and *Blanc v. Cayo*.

Blanc v. Longstaff; Same v. Smith, doing business as Smith Sewer Service, 58 USPQ 54.

The oral decision of Judge Dewey in this case was given May 28, 1943. Judge Raymond's decision in the present case was rendered May 18, 1943. There is nothing in Judge Dewey's decision to give any definite idea of the machine and cutter structure held to infringe by Judge Dewey. There is no evidence in the record in the present case as to what those structures were. This Court is asked by petitioners to indulge in a guessing game as to what was actually decided by Judge Dewey except that he held the patents valid and infringed but he does not discuss any claim and there is no statement as to the claim or claims of either patent held valid and infringed. Contrast this with the findings of fact and the conclusions of law in the present case in which the structures involved and the basis on which the decision was reached are clearly and specifically and intelligently stated. This cannot in any way be said to be a conflicting decision except that it conflicts with Judge Raymond's decision holding Claims 4, 5, 7, 8, 9, 10 and 11 of the machine reissue

patent invalid. As stated, there is no indication as to what claim or claims of either patent Judge Dewey was talking about.

The Court of Appeals in this present case reversed Judge Raymond as to Claim 4 which had previously been held valid in the Sixth Circuit and affirmed his decision on the predicate of non-infringement as to both patents.

Therefore, we respectfully submit there is nothing here in the nature of conflicting decisions justifying the granting of the petition.

No Public Interest Involved Such as Would Justify the Granting of Petition

Petitioner urges as a reason for granting the writ that public interests are involved. Of course, public interest is, in a way, involved in all patent litigation but there is nothing unusual in this case to justify review by this Court. That the petitioner is unwarrantedly aggressive in bringing suits mainly against users is evidenced by the decisions discussed and by the number of suits filed as evidenced by the file wrapper exhibits of the patents in suit and the original machine patent, Exhibits B, D and E. Seemingly, nothing short of holding the patents invalid would remedy that.

If the case were to be reviewed on the ground of the public interest, validity of the reissue patent as a reissue, which has not been determined by any court, should be considered. *Mercoïd Corporation v. Mid-Continent Investment Co.*, 60 USPQ 21, U. S. Supreme Court decision Jan. 3, 1944.

The reissue application was filed March 15, 1940, on original patent issued March 15, 1938. Claim 4 was held valid but not infringed in *Blanc v. Curtis*, on June 7, 1939.

Claim 4 was also held valid and not infringed in *Blanc v. Weston*, on July 31, 1939.

Petitioner in his oath on the application for reissue stated, Exhibit D, reissue File Wrapper page 20:

“* * * That this advice as to the desirability of filing a reissue has only been made in recent months; that deponent has proceeded as rapidly as possible consistent with the demands of other work on his part and on the part of his attorneys; * * *”

This oath on its face shows lack of diligence. *Sontag Chain Stores Co. v. National Nut Company*, 310 U. S. 281, at 291, 84 L. Ed. 1284; *Topliff v. Topliff*, 145 U. S. 156, 36 L. Ed. 658.

Additionally, if the case is to be considered from the standpoint of public interest, the validity of the claims, particularly claims 3 and 6 of the cutter patent and the claims of the reissue machine patent which have been held to be invalid by District Judge Raymond in the present case on prior art, would have to be considered, because of indefiniteness, under the authority of *United Carbon Co. v. Binney & Smith Company*, 317 U. S. 228, 87 L. Ed. 232; and *Schriber-Schroth Company v. Cleveland Trust Co.* (two cases), *supra*.

The validity of these claims, if the case is to be reviewed in the interest of the public, would have to be considered from the angle of exhausted combinations. *Mercooid Corporation v. Mid-Continent Investment Co.*, *supra*; *Bassick Mfg. Co. v. Hollingshead Co.*, 298 U. S. 415, 80 L. Ed. 1251

The decision of the District Court and of the Court of Appeals in the present case are unusually clear and specific and both hold that cutters in which the blades are set in direct opposition do not infringe. That is also the

holding of the Circuit Court of Appeals for the Eighth Circuit and of the District Judge in the Eighth Circuit. There is no conflict of decisions of different circuits, but they are in exact accord.

The decisions of the Court of Appeals for the Sixth Circuit in *Blanc v. Curtis* and in the present case are clear that neither the Sanger machine nor the Cayo machine involved in those two decisions are infringements.

The District Court in *Blanc v. Weston*, reported 42 USPQ 427, also held that the Sanger machine is not an infringement of Claim 4 of the original machine patent. No appeal appears to have been taken from that decision.

The decision of the District Court in *Blanc v. Longstaff, Same v. Smith*, doing business as Smith Sewer Service, 58 USPQ 54, holds some structure to be an infringement and some claim or claims of the machine patent and the cutter patent to be valid but there is no definite indication as to what claim or claims were involved or what structures were involved and there is nothing that this Court could do to clarify that.

There is no conflict between the two decisions of the Court of Appeals for the Sixth Circuit.

Therefore, we respectfully submit that there is no justification for granting the petition and it should be denied.

Respectfully submitted,

AL CAYO, doing business as
CAYO ELECTRIC SEWER MACHINE.
By WILLIAM S. HODGES.

OTIS A. EARL,
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